82-2082

No. _____

Office - Supreme Court, U.S.
FILED
JUN 16 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

YVONNE LARSEN, W. DANIEL LARSEN,
JOSEPH K. HARMON, and EDWIN J. GRAY,

Petitioners,

vs.

JULIE FISHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution compels entry of summary judgment in a civil defamation action brought by a defeated public official against her successful challenger for campaign statements criticizing her performance in office where the evidence is insufficient to support a finding of actual malice with the convincing clarity required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. Whether a candidate for public office can be found to have acted with actual malice for failing to further investigate criticisms of her opponent's conduct in office where the candidate relied on reports published in the news media and confirmed by a trustworthy source with first-hand knowledge of the events.

   a. Does a school board candidate have a duty to independently investigate information about the incumbent school board member's conduct in office which has been widely reported in local news media?

   b. Does a school board candidate have a duty to repeatedly reconfirm reports from the school superintendent about conversations he had with the incumbent school board member?

   c. Does a school board candidate have a duty to investigate the incumbent's denial of threatening the school superintendent where the superintendent has repeatedly confirmed that the threats were made?

PARTIES

Petitioners are Yvonne Larsen, W. Daniel Larsen, Joseph K. Harmon, and Edwin J. Gray. Respondent is Julie Fisher.[1]

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[1]Michael Scott-Blair and Copely Press, Inc. were also parties to the proceedings in the court below. However, these parties were defendants on distinct and severable causes of action arising out of completely different facts and have no interest in the outcome of the actions brought by Julie Fisher against Petitioners.

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OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 138 Cal.App.3d 627, 188 Cal.Rptr. 216 (1982) (Appendix A).[2]

JURISDICTION

The decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, was filed on December 24, 1982, reversing in part the summary judgment entered in favor of Petitioners by the

[2]For convenience, the appendices to this Petition are separately presented.

Superior Court of California on May 13, 1981. The Court of Appeal denied a timely petition for rehearing on January 11, 1983 (Appendix B). On March 23, 1983, the Supreme Court of California denied a timely petition for hearing; Justice Mosk was of the opinion that the petition should be granted (Appendix C). This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

STATEMENT OF THE CASE

Statement of Facts

In June 1977, San Diego was stunned by the San Diego Teachers' Association's illegal strike. School Board member Julie Fisher played a highly visible and controversial role in the events surrounding the strike and in the School Board's decision to grant amnesty to the strikers despite their defiance of a temporary restraining order and a preliminary injunction.

Before the strike, the San Diego School Board authorized a negotiator to represent the School Board in negotiations with the San Diego Teachers' Association (Union). Fisher believed these fragile negotiations were failing. She decided to conduct her own negotiations with the Union without telling either the School Board or its authorized

negotiator. In deposition testimony Fisher stated that she was acting as a "self-appointed emissary."

On June 5, 1977 Fisher went to the Union office. She disclosed to Union leaders the tone and substance of confidential executive sessions of the School Board called in response to the threatened teachers' strike. Fisher and Union leaders developed a list of demands which Fisher would then urge School Superintendent Thomas Goodman to recommend to the School Board.

Fisher then took the list of Union demands to Superintendent Goodman's office to urge him to recommend the demands to the Board. Only two people were present at this meeting: Fisher and Goodman. Both versions of the meeting are set forth below.

Fisher's version of the June 5 meeting. Fisher told Superintendent Goodman that a teachers' strike should be avoided for the good of the District. She told him that if the District could solve integration and employee-relations problems, he would gain a national reputation. Fisher told Goodman that a teachers' strike would focus attention on him because "there were a lot of things that he was getting away with that nobody's paying attention to." She told him his wrongdoing included misuse of developers' funds. Goodman told her that if she believed him guilty, she should report him to the District Attorney or to the Grand Jury.

Goodman's version of the June 5 meeting. Fisher told Goodman a strike should be averted. She presented the Union demands and sought his support. She told him that if he did not support her proposal and if a strike occurred, she would publicly charge him with four counts of wrongdoing and call for his resignation. She accused him of: (1) misappropriating developers' funds; (2) falsifying attendance records; (3) improperly demoting an administrator; and (4) improperly recommending dismissal of a Children's Center supervisor. Goodman reminded Fisher that she had made the charges before and the School Board had rejected them. However, he advised her to inform the District Attorney or Grand Jury if she really believed the charges. Fisher replied that she had already gone to the Grand Jury, but they would not listen to her. Fisher said the Grand Jury would listen when she had the backing of 2,000 teachers. Superintendent Goodman prepared a chronology reflecting this conversation.

When Goodman refused to support Fisher's list of Union demands, Fisher returned to the Union office to continue her independent negotiations with the Union leaders. Fisher and Union leaders worked out an eight-point list of demands. Fisher then went to the homes of two School Board members and Superintendent Goodman, seeking their support for these Union demands.

When its demands were rejected, the Union called a strike. On Monday, June 6, 1977, the Honorable Wesley Buttermore, Judge of the Superior Court, issued a temporary restraining order declaring the strike illegal.

On Tuesday, June 7, 1977, the teachers remained on strike in defiance of the temporary restraining order. The School Board met. At that meeting Fisher charged Superintendent Goodman with the four charges of wrongdoing threatened at their June 5 meeting and called for his resignation. She left the School Board meeting and repeated the charges before the striking teachers who cheered: Julie! Julie! Julie!

Reverend George W. Smith, President of the School Board, promptly rebuked Fisher, condemning her "irresponsible and outrageous" attack on Superintendent Goodman. Reverend Smith held a press conference where he disclosed Fisher's conduct at the June 5 meeting with Superintendent Goodman. Reverend Smith revealed that Fisher had threatened to charge Goodman with wrongdoing and call for his resignation if Goodman did not support her proposal. According to reports in both major local daily newspapers, Fisher denied threatening Superintendent Goodman but Superintendent Goodman confirmed that Reverend Smith's account of Fisher's threats was accurate.

Tempers flared; criticism was caustic. School Board President Smith declared: "It is reprehensible that Mrs. Fisher is conducting her reelection campaign at the expense of Dr. Goodman and his family and that she feels that destruction of the integrity of the District is not too high a price to pay for her personal gain." Bill Foxx, General Manager of KCST-TV, broadcast an editorial demanding Fisher's immediate resignation.

On Wednesday, June 8, the Honorable Jack Levitt, Judge of the Superior Court, issued a preliminary injunction declaring the strike illegal. He agreed with the earlier ruling of Judge Buttermore that the

strike threatened irreparable harm to the District's students. Defying the injunction, the teachers remained on strike.

Fisher supported the teachers during the strike. She agreed with some of the striking teachers' demands including binding arbitration, reduced class size, and a 5% pay raise. On the third day of the illegal strike, Fisher went to the Union office, worked out and signed an amnesty agreement with the strikers, and attempted to get other School Board members to support the agreement. As Ray Kipp reported in the San Diego Union:

> The SDTA [San Diego Teachers' Association] aided by board member Julie Fisher, developed its own no-reprisal, back-to-work agreement late last night, and attempted to get at least two other board members to sign it.

The teachers continued to defy the injunction and remained on strike on Thursday, June 9. The School Board met again. When Fisher arrived at the Board meeting she was greeted by a standing ovation from the teachers in the audience. Fisher and two other Board members voted to grant the strikers amnesty; the strikers agreed to return to the classroom.

Many condemned the amnesty vote and Fisher's role in the teachers' strike. A letter to the editor of the San Diego Tribune described the amnesty vote as "the complete lack of backbone and the sellout of the taxpayers and the law-abiding students, parents, teachers, and other employees." City Councilman Mac Strobl called for Fisher's resignation. A La Jolla Light editorial by John Sasso sarcastically singled out Fisher for "[s]pecial commendation . . . for her open support of teachers in rebellion."

On July 27, 1977, Yvonne Larsen declared her candidacy for the School Board seat held by Fisher. W. Daniel Larsen and Joseph K. Harmon helped draft her campaign announcement criticizing Fisher's role in the illegal teachers' strike as follows: "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?"

On October 24, 1977, Yvonne Larsen gave a campaign speech criticizing Fisher for threatening Superintendent Goodman. W. Daniel Larsen and Edwin J. Gray helped draft this speech which contained the following statements:

> We watched [Fisher] as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail.
>
> She told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.
>
> But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation.
>
> The superintendent refused to go along with what was almost a form of bribery.
>
> Frankly, I hold no brief either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with.
>
> But outright blackmail is not a quality I take too lightly.
>
> The strike -- by any standard -- was illegal. In my opinion, it was also immoral. And my opponent was associated with it every step of the way.
>
> Her vote [or amnesty] coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising."

On November 4, 1977, Yvonne Larsen held a news conference where she released a statement which W. Daniel Larsen and Edwin J. Gray helped draft. The statement criticized Fisher for her role in the teachers' strike as follows: "Furthermore, Julie Fisher's collaboration last Spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law."

On July 27, 1978, Fisher filed a complaint for libeland slander alleging she had been defamed by the Larsen campaign statements.

How the Federal Question Was Raised

Petitioners' First Amendment privilege under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was raised at every stage of the proceedings. Appendix D consists of a summary of the following portions in the record where this federal question was raised below:

1. The complaint alleged that the statements complained of were made with actual malice;

2. Petitioners demurred to the complaint on First Amendment grounds;

3. Petitioners asserted as an affirmative defense that the action was barred by the First Amendment;

4. Petitioners moved for and obtained summary judgment on the ground that no question of fact exists on the issue of actual malice;

5. The Court of Appeal partially reversed the summary judgment on the ground that a question of fact exists on the issue of actual malice; and

6. Petitioners sought review by the California Supreme Court on the ground that the Court of Appeal decision on the issue of actual malice violated their First Amendment rights.

Thus, the controlling issue from the inception of this litigation has been the constitutional protection to be afforded to Petitioners' political speech.

Finality of the State Court Decision

The Court of Appeal reversed summary judgment in this public official defamation action on the ground that sufficient evidence of actual malice exists for the issue to go to the trier of fact. The California Supreme Court declined to exercise jurisdiction. Petitioners submit that the evidence is constitutionally insufficient to establish actual malice and that the burden of proceeding with litigation violates their constitutional rights. Petitioners are now faced with the expense and delay of a trial

and months -- if not years -- of repetitious appellate review of the very issues presented by this petition. Under these circumstances, this Court's jurisdictional requirement of finality is satisfied. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975).

In *Cox Broadcasting* this Court defined categories of cases where a state court decision on a federal issue will be treated as a final judgment for the purposes of 28 U.S.C. § 1257 without awaiting the completion of the additional proceedings anticipated in the lower state courts. *Id.* at 477, 476-487. This case falls within the category of cases where a substantial federal issue has been finally and incorrectly decided by the state court and reversal of the state court decision would preclude further litigation on the causes of action. Although Petitioners may prevail at trial, if Petitioners are correct in asserting that the First Amendment requires summary judgment, there should be no trial at all. Moreover, if the Petitioners prevail at trial, the unreviewed decision of the Court of Appeal would survive to chill the exercise of free speech in political campaigns, thus eroding a fundamental constitutional right. *Id.*, at 482-486.

Petitioners therefore submit that the decision of the Court of Appeal is final for purposes of the jurisdiction of this Court under 28 U.S.C. § 1257(3).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW PRESENTS SIGNIFICANT AND RECURRING CONSTITUTIONAL ISSUES CONCERNING THE APPLICATION OF *NEW YORK TIMES CO. V. SULLIVAN*

The decision below raises three recurring issues concerning the proper application of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The threshold issue is whether the *New York Times* actual malice standard applies to non-media defendants. The second issue concerns the procedure to be followed where the *New York Times* standard applies. Specifically, the issue is whether *New York Times* modifies the usual summary judgment rules and prescribes a policy of liberally granting summary judgments to prevent the chilling effect of protracted litigation. The third issue is whether actual malice can be established by showing a candidate for public office failed to contact the incumbent public official

before making statements critical of the incumbent's conduct in office based on information received from reliable sources.

A. Does the *New York Times* actual malice standard apply to non-media defendants?

Petitioners are individual defendants in a defamation action brought by a defeated school board member for statements about her conduct in office made by her challenger in a school board election campaign. Throughout this litigation, Petitioners have relied on *New York Times v. Sullivan* to protect their First Amendment right to criticize a public official's conduct in office (Appendix D). The lower court extended the *New York Times* privilege to the Petitioners. However, this Court has never expressly applied the *New York Times* standard to non-media defendants. Certiorari should be granted so that this Court may consider and determine whether the *New York Times* privilege applies to non-media defendants.

This Court has frequently performed the delicate task of balancing the constitutional right to freedom of the press against the states' right to afford compensation for injury to reputation. In *New York Times*, after balancing these competing rights, this Court held that the First Amendment restricted the states' right to afford a remedy for harm to reputation by conferring a qualified immunity on the news media when it is sued by a public official. This Court prohibited the states from allowing a public official to recover for defamation from the news media unless the official proves actual malice.

While this Court has thus balanced state protection of individual reputation against constitutional protection of media speech, this Court has yet to weight state protection of individual reputation against constitutional protection of individual speech. In fact, in *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n. 16 (1979), this Court expressly reserved the question of whether the *New York Times* actual malice standard applies to non-media defendants.

Confronted with this open question, state and federal courts have been left to reach their own conclusion about the application of *New York Times* to non-media defendants. Courts facing this recurring issue have frequently held that the *New York Times* standard applies to non-media defendants. The courts reason that the purpose of the press is to

facilitate discussion by individuals. To protect the press but not the discussion would be to place greater value on the means than on the end. Distinguishing between individual and media defendants would create a "dangerous disequilibrium between the first amendment's guarantees of freedom of speech and the press." *Alvins v. White*, 627 F.2d 637, 649 (3d Cir. 1980).[3]

On the other hand, constitutional scholars have argued that a disequilibrium between the first amendment's guarantees of freedom of speech and the press is exactly what the Founding Fathers had in mind. As Justice Potter Stewart explained, the Free Press Clause must be distinguished from the Free Speech Clause:

> This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

Stewart, "Or of the Press," 26 Hastings L.J. 631 (1975).[4]

The question of the application of the *New York Times* actual malice standard to individuals is significant for two reasons. First, an individual's right to criticize a public official's conduct in office is guaranteed by the First Amendment. Extending the *New York Times* standard would protect this fundamental right. Second, delimiting the states' power to award damages for libel actions requires the accommodation of state and federal interests under the Constitution. Certiorari should be granted to resolve these issues.

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[3]Other cases considering this issue include: *Rowden v. Amick*, 446 S.W.2d 849 (Mo. 1969); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688, 694-695 (Md. 1976); *Rowe v. Metz*, 564 P.2d 425 (Colo. 1977); *Bussie v. Larson*, 501 F.Supp. 1107, 1111-1113 (M.D. La. 1980); *Woy v. Turner*, 533 F.Supp. 102, 103-104 (N.D. Ga. 1981); and *Rodriquez v. Nishiki*, 653 P.2d 1145, 1149 (Haw. 1982).

[4]See generally, Symposium on the Press Clause, 7 Hofstra L.Rev. 559 (1979) considering whether the press is entitled to special constitutional privileges.

B. Does the *New York Times* actual malice standard modify traditional summary judgment rules and prescribe a policy of liberally granting summary judgments?

Petitioners obtained summary judgment on the ground that the evidence of actual malice was insufficient to present a triable issue of fact. The Court of Appeal partially reversed the summary judgment holding that the evidence of actual malice presented a triable issue of fact. Petitioners submit that the *New York Times* actual malice standard compels entry of summary judgment because the evidence is insufficient to establish actual malice with convincing clarity. Certiorari should be granted to determine the propriety of and the standard for summary judgment under *New York Times*.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) this Court held that the Constitution delimits a State's power to award damages for libel actions brought by public officials against critics of their official conduct. To recover, the public official must establish actual malice with clear and convincing evidence. *Id.*, 283-286.

Critics observed that the *New York Times* privilege operated too late in the litigation process to prevent self-censorship since the fear of defending a defamation action would be as chilling to the exercise of free speech as the fear of a judgment in the action. Anderson, *Libel and Press Self-Censorship*, 53 Tex.L.Rev. 422 (1975); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) *cert. denied* 385 U.S. 1011 (1967). In practical terms, in 1975, the cost of a libel defense ranged from $10,000 to $19,000 (*Anderson, supra* at 434); currently, the fee for New York lawyers for the initial stages of a libel defense ranges from $20,000 to $35,000 (Kaus, *The Law: The Plaintiff's Hour*, Harper's 14 (March, 1983)). And the costs continue to climb.

To cure this serious deficiency in the *New York Times* privilege, state and federal courts adopted a policy of liberally granting summary judgment to insure early disposition of defamation actions having First Amendment implications. *Nader v. de Toledano*, 408 A.2d 31, 43 n. 7 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980) and cases cited therein. By 1979, many courts regarded the granting of summary judgment in libel actions as the rule rather than the exception. *Loeb v. New Times Communications Corp.*, 497 F.Supp. 85, 94 n. 14 (S.D.N.Y. 1980) and cases cited therein.

In 1979, this Court questioned but did not address the propriety of resolving the actual malice issue on summary judgment considering the complexity of the issue. *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (1979), *Wolston v. Reader's Digest Association*, 443 U.S. 157, 161 n. 3 (1979).

This Court's cautionary footnotes left the lower courts in a quandry. The Second Circuit announced that "until more directly advised" courts may no longer consider the chilling effect a libel suit may have on first amendment rights. *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (2d Cir. 1979) *cert. denied* 449 U.S. 839 (1980). The Sixth Circuit has followed this lead. *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 917 (6th Cir. 1982). Other courts however have continued to follow the rule of liberally granting summary judgment on the actual malice issue. *Edgartown Police Patrolmen's Association v. Johnson*, 522 F.Supp. 1149 (D.C. Mass. 1981). See 10A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2730, pp. 240-248 (2d ed. 1983).

Beyond the question of the propriety of favoring summary judgment on the issue of actual malice, a question remains as to the standard the courts should use on summry judgment since actual malice must be established with clear and convincing evidence. *New York Times Co. v. Sullivan*, 376 U.S. 254 at 285-286 (1964); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d at 940; *Nader v. de Toledano*, 408 A.2d at 44-50. While summary judgment has frequently been granted on this issue, the trial courts have used different standards in reaching this result. These differing standards stem from differing interpretations of the *New York Times* admonition to the courts to independently examine the evidence to insure that First Amendment rights are protected. *New York Times Co.* at 285; *Nader* at 45; *Velle Transcendental Research Association v. Sanders*, 518 F.Supp. 512, 518-519 (C.D. Ca. 1981).

The differing standards for granting summary judgment fall within two main categories. First, some courts depart from the usual summary judgment rules. These courts require the trial judge to view the evidence in its most reasonable light and to grant summary judgment if the trial judge fails to find actual malice with convincing clarity. *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-923 (D.C. Cir. 1969) *cert. denied* 398 U.S. 940 (1970). Second, some courts follow the usual summary judgment rules. These courts require the trial judge to view the evidence in the light

most favorable to the plaintiff and to deny summary judgment if a reasonable jury could find actual malice with convincing clarity. *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 920, 922-923 (9th Cir. 1973) *cert. denied* 419 U.S. 872 (1974); *Loeb v. New Times Communications Corp.*, 497 F.Supp. 85, 94 (S.D.N.Y. 1980). See generally Note, *The Role of Summary Judgment in Political Libel Cases*, 52 S.Cal. L.Rev. 1783 (1979) and Note, *The Use of Summary Judgments in Defamation Cases*, 14 U.S.F.L. Rev. 77 (1979).

Thus, significant and recurring issues have arisen concerning the use of summary judgments in cases applying the *New York Times* actual malice standard. These issues involve the propriety of and the standard for granting summary judgment on the issue of actual malice. Certiorari should be granted to determine: (1) whether the First Amendment compels liberal use of the summary judgment procedure to prevent the chilling effect of protracted litigation; and (2) whether *New York Times* compels a departure from the traditional summary judgment standard of evaluating evidence of actual malice.

C. Can a candidate for public office be found to have acted with actual malice for failing to contact her incumbent opponent before making campaign statements criticizing the incumbent's conduct in office?

Petitioners were sued for campaign statements criticizing Fisher for threatening Superintendent Goodman and supporting the striking teachers. Petitioners obtained summary judgment on the ground that these statements were not made with actual malice since Petitioners relied on widespread media reports confirmed by reliable sources. The Court of Appeal reversed holding that a jury could find actual malice because Fisher denied these reports and Petitioners failed to ask her about her denials. Certiorari should be granted to determine whether Petitioners' failure to investigate their opponent's denial of reliable information is sufficient to support a finding of actual malice with the convincing clarity required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The *New York Times* actual malice standard imposes a duty on appellate courts to independently examine the record to make certain that governing constitutional principles have been properly applied and that the plaintiff has met the burden of proving actual malice with convincing clarity. *Id.* at 286 and n. 26. Actual malice in public figure defamation

actions means knowledge of falsity or reckless disregard for truth or falsity. As explained by this Court in *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968):

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Investigatory failures alone have repeatedly been held insufficient to establish actual malice with clear and convincing evidence as required by *New York Times*. *New York Times* at 288; *St. Amant* at 732-733. Indeed, the complete failure to investigate is not sufficient to show actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967). Rather, to support a finding of recklessness, the record must contain clear and convincing evidence that the defendant subjectively entertained serious doubts about the truth of the information as where the defendant relied on an anonymous telephone tip or had other obvious reasons to doubt the veracity of the informant or the accuracy of the report. *St. Amant*, at 731.

The instant case presents the question of whether a public official's denial of accusations is sufficient to establish by clear and convincing evidence that Petitioners entertained serious doubts about the truth of information reported by reliable sources. The court below held that a jury could find that Petitioners acted recklessly because they failed to check with Fisher, the incumbent opponent, before making campaign statements based on widespread media reports which had been confirmed by trustworthy sources with first-hand knowledge of the events.

Before making the campaign statements at issue, Petitioners read the widespread media reports of Fisher's threats against Goodman and of her support for striking teachers. Petitioners independently verified these reports. They obtained Goodman's personal chronology documenting his account of Fisher's threats. Further, Yvonne Larsen contacted two other candidates for school board who had observed Fisher's conduct during the teachers' strike. Thus, Petitioners campaign statements were based on articles in reputable newspapers which Petitioners had independently verified by contacting reliable sources with first-hand knowledge of the events.

Despite this uncontradicted evidence, the court below held that the evidence supported a finding of actual malice. The court pointed to three items of evidence to support this conclusion: (1) the Petitioners' motive; (2) the Petitioners' reliance on Goodman's chronology; and (3) the Petitioners' failure to contact Fisher to learn her side of the story. These will be considered in order.

First, the court indicated that the Petitioners' motive supported a finding of actual malice. The court observed that Edwin J. Gray, the campaign manager, employed political rhetoric and hyperbole in an effort to make Larsen's campaign more "vigorous" and that W. Daniel Larsen wanted a "hard hiting" campaign. But, as this Court explained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), public official defamation actions must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." To base a finding of actual malice on the desire to engage in a vigorous political campaign destroys the protection that gives meaning to *New York Times*.

Second, the court held Petitioners' reliance on Goodman's chronology was reckless. The court suggested that Petitioners should have contacted Goodman to reconfirm his account. But they had already read two newspaper articles in which Goodman confirmed the threats and Goodman's personal written record of the threats. Petitioners had no reason to expect Goodman to disavow his account, and in fact he never has. Goodman testified in support of Petitioners' motion for summary judgment that his chronology was accurate. The court's suggestion that Petitioners should have confirmed this account for the fourth time imposes an excessively prudent and futile investigation requirement.

The court also held that Petitioners' reliance on Goodman was reckless because he was biased. But there was no unbiased source to turn to -- only Goodman and Fisher were at the meeting and their stories were irreconcilable. Petitioners submit that in actions involving the First Amendment, a defendant is entitled to rely on a single source, even if it represents only one side of the story, without fear of defamation prosecution by a public official. *Vanderburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026-1028 (5th Cir. 1975); *New York Times v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

The third and critical item of evidence relied on by the court to support a finding of actual malice is that Fisher denied the reports and that Petitioners failed to check with her before making campaign statements criticizing her performance in office. The court thus allows the plaintiff public official to establish actual malice simply by showing that she denied the accusations of wrongdoing.

This conclusion is a constitutional outrage! Few public officials candidly admit their own wrongdoing, most vehemently deny it. Yet, critics must be free to speak out if our democratic system is to survive. Fear of being subjected to protracted and expensive litigation chills the exercise of free speech. Recent reports indicate an increase in the use of libel actions to intimidate those who criticize public figures. Pell, "*Libel as a Political Weapon*," The Nation, June 6, 1981. The *New York Times* standard was designed to prevent the chilling effect of such actions. But permitting a finding of actual malice on a showing only that the public official denied wrongdoing destroys the protection promised by *New York Times*.

Certiorari should be granted so that this Court can determine whether the court below properly concluded that the *New York Times* actual malice standard can be satisfied by evidence that the plaintiff public official denied reliable reports criticizing her conduct in office. See *Martin Marietta Corp. v. Evening Star*, 417 F.Supp. 947, 960 (D.C.D.C. 1976).

II

THE DECISION BELOW PRESENTS CONSTITUTIONAL ISSUES CONCERNING THE APPLICATION OF *NEW YORK TIMES* WHICH ARE SIMILAR TO ISSUES ALREADY PENDING BEFORE THIS COURT

On April 25, 1983, this Court granted certiorari in *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189 (1st Cir. 1982), *petition for cert. granted* 51 U.S.L.W. 3774 (1983) (No. 82-1246). In *Bose*, the First Circuit reversed judgment for the plaintiff manufacturer of loudspeakers in a product disparagement action brought against the publisher of a monthly magazine on the ground that the plaintiff failed to establish actual malice with the clear and convincing evidence required by the *New York Times* standard.

As in *Bose*, the instant case presents the issue of the standard for appellate review of evidence of actual malice under *New York Times*. But this case is factually distinguishable. This case concerns criticisms of a public official's conduct in office by individual defendants during a political campaign rather than criticisms of product performance by a media defendant in a monthly magazine. By considering *Bose* and the instant case together, this Court will be able to explore the constitutional policies and implications raised on the same substantive issue under different facts. Certiorari should be granted because of the significant similarities and the significant differences between the *Bose* case and the case at bar.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the California Court of Appeal, Fourth Appellate District.

Respectfully submitted,

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